No. 15-674

IN THE

Supreme Court of the United States

UNITED STATES, ET AL.,

Petitioners,

v.

STATE OF TEXAS, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF FORMER FEDERAL IMMIGRATION AND HOMELAND SECURITY OFFICIALS AS AMICI CURIAE IN SUPPORT OF THE UNITED STATES

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INTEREST OF AMICI CURIAE[1]

Amici served in senior positions in the federal agencies charged with enforcement of U.S. immigration laws under both Democratic and Republican administrations.

Paul Virtue served as General Counsel of the United States Immigration and Naturalization Service ("INS" or "the Service") from 1998 to 1999. INS is the predecessor agency to the federal offices within the Department of Homeland Security ("DHS") that now have responsibility for enforcing the nation's immigration laws. He also served as Executive Associate Commissioner from 1997 until 1998 and Deputy General Counsel from 1988 until 1997.

Bo Cooper served as General Counsel of INS from 1999 until 2003.

Roxana Bacon served as Chief Counsel of U.S. Citizenship and Immigration Services ("USCIS") from 2009 to 2011.

Seth Grossman served as Chief of Staff to the General Counsel of DHS from 2010 to 2011, Deputy General Counsel of DHS from 2011 to 2013, and as Counselor to the Secretary at the same agency in 2013.

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[1] Pursuant to Supreme Court Rule 37.3(a), all parties have consented to the filing of this brief. Pursuant to Rule 37.6, amici certify that no counsel for a party authored this brief in whole or in part, and no persons other than amici curiae or their counsel made a monetary contribution to its preparation or submission.

Stephen H. Legomsky served as Chief Counsel of USCIS from 2011 to 2013 and as Senior Counselor to the Secretary of DHS on immigration issues from July to October 2015.

John R. Sandweg served as Acting Director of Immigration and Customs Enforcement ("ICE") from 2013 to 2014, as Acting General Counsel of DHS from 2012 to 2013, as Senior Counselor to the Secretary of DHS from 2010 to 2012, and as Chief of Staff to the General Counsel of the same agency from 2009 to 2010.

As former leaders of the nation's primary immigration enforcement agencies, amici are familiar with the historical underpinnings of the deferred action and work authorization policies at issue in this litigation. Amici's experience demonstrates that prosecutorial discretion plays a vital role in the rational enforcement of federal immigration law, which has historically established laudable policy objectives backed by inadequate enforcement resources. Amici's experience is that the exercise of executive discretion in the immigration context is vital to advancing the national security interests, humanitarian values, and rule of law principles underlying federal immigration law.

SUMMARY OF ARGUMENT

For more than half of a century, the Executive Branch has developed and implemented policies designed to delay—in many cases indefinitely—the enforcement of deportation and other aspects of federal immigration law. Administrations of both Republican and Democratic Presidents have relied on these policies to enforce federal immigration

laws in a manner that is efficient, rational, and humane. While these policies have at times generated political controversy, until recently their legal underpinnings did not. That is because, as a general rule, the ordering of enforcement priorities is a "special province of the Executive." *Heckler v. Chaney*, 470 U.S. 821, 833 (1985).

Throughout this period, the Executive Branch has ordinarily allowed aliens with deferred action to apply for authorization to work while they remain in this country. This policy, which is codified at 8 C.F.R. § 274a.12(c)(14), was the subject of extensive deliberation in the 1970s and 1980s, including several rounds of notice and comment rulemaking by INS. These executive deliberations were recognized and ratified by Congress through a series of enactments during and after the same period.

The decision of the divided court of appeals panel threatens to upend the sensible enforcement policies on which federal immigration officials have relied for decades. The Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program is the same in its basic attributes as numerous deferred action policies that preceded it. As with DAPA, nearly all prior deferred action policies exercised prosecutorial discretion in order to focus enforcement efforts on the highest priority cases consistent with federal immigration policy, while allowing for work authorization for individuals who will likely remain in the country for at least some duration.

Executive discretion to establish enforcement policies is especially important in the immigration

context because scarce resources are available to implement myriad federal immigration policies and because the selection of enforcement priorities has potentially severe consequences for national security, the employment market, and the preservation of family unity. Prosecutorial discretion is just as important, and just as lawful, when it is used to establish priorities that may affect large numbers of persons as it is when it affects only individual cases. Reversal of the decision below is vital to ensure that immigration enforcement priorities are determined by the Executive Branch officials to whom Congress has committed such discretion, rather than by judicial fiat.

ARGUMENT

I. DEFERRED ACTION POLICIES HAVE BEEN AN ESSENTIAL COMPONENT OF THE EXECUTIVE BRANCH'S ENFORCEMENT OF FEDERAL IMMIGRATION LAW FOR DECADES

For more than half of a century, federal immigration officials have exercised enforcement discretion through policies that permit "deferred action," "extended voluntary departure," "parole," or "deferred enforced departure" for various classes of aliens. Notwithstanding the variation in terminology, these programs are fundamentally alike: each enables certain classes of otherwise removable aliens to remain temporarily in (or, in the case of parole, to enter) the United States and, in most cases, to support themselves while they are present by working lawfully. In amici's experience, the objectives Congress sought to achieve via the federal immigration laws would be thwarted if Executive Branch officials were suddenly deprived of the discretion to use such policies.

A. Deferred Action Policies Have Been A Common Feature of Immigration Enforcement Since the 1950s

In 1956, President Eisenhower "paroled"—i.e., authorized the admission into the United States of—roughly one thousand foreign-born children who were adopted by American citizens overseas but who were precluded from entering the United States because of statutory quotas. The President explained that he had been "particularly concerned over the hardship" that these quotas imposed, especially on members of the U.S. armed forces who were "forced to leave their adopted children behind"

following tours of duty. On the advice of the Attorney General and Secretary of State, the President adopted the parole policy "pending action by Congress to amend the law." *See* President Dwight Eisenhower, *Statement Concerning the Entry into the United States of Adopted Foreign-Born Orphans* (Oct. 26, 1956) *available at* http://www.presidency.ucsb.edu/ ws/?pid=10677.

As the Cold War entered its second decade, the Eisenhower Administration began to use the parole power as an instrument of foreign policy. For example, President Eisenhower ordered the parole of Cubans fleeing that country's oppressive communist regime—a program continued by the Kennedy, Johnson, and Nixon Administrations, and which ultimately permitted over six hundred thousand otherwise ineligible aliens to enter the United States. American Immigration Council, *Executive Grants of Temporary Immigration Relief, 1956-Present* (Oct. 2014).

The Ford and Carter Administrations each made grants of "extended voluntary departure," meaning that they "temporarily suspend[ed] enforcement" of deportation for "particular group[s] of aliens." *Hotel & Rest. Employees Union, Local 25 v. Smith*, 846 F.2d 1499, 1510 (D.C. Cir. 1988) (en banc); Andorra Bruno et al., CRS, *Analysis of June 15, 2012 DHS Memorandum, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (2012).

The Reagan and George H.W. Bush Administrations continued and broadened deferred action. In 1986, following passage of the Immigration Reform and Control Act (IRCA), Pub.

L. No. 99-603, 100 Stat. 3359 (1986), the Reagan Administration also launched the "Family Fairness" program. IRCA had established a pathway to lawful status for certain aliens who otherwise were present without authorization in the United States, *see id.* at § 201, 100 Stat. at 3445, but the Act did not state whether INS should continue to deport the relatives of aliens who might qualify for lawful status under the new law—and the legislative history makes clear that the omission was a deliberate legislative decision. *See* S. Rep. 99-132, at 16 (1986) ("It is the intent of the Committee that the families of legalized aliens will obtain no special petitioning rights by virtue of the legalization."); *see also INS Reverses Family Fairness Policy*, 67 No. 6 INTERPRETER RELEASES 153 (Feb. 5, 1990) ("What to do when some but not all members of an alien family qualify for legalization has been a controversial issue since the beginning of the amnesty program."). Confronting that question, INS Commissioner Alan Nelson acknowledged that there was "nothing in [IRCA or the legislative history] that would indicate Congress wanted to provide immigration benefits to others who didn't meet the basic criteria, including the families of legalized aliens." Alan Nelson, *Legalization and Family Fairness: An Analysis* (Oct. 21, 1987), *reprinted as* 64 No. 41 INTERPRETER RELEASES 1191, 1201 ("Nelson Statement"). INS therefore lacked express statutory authority to grant resident status to aliens who did not otherwise qualify for it. *Id.*

The fact that IRCA did not provide express statutory authority to INS to alter the status of non-qualifying aliens, however, did not mean that

the Act required the Service to deport all such persons, or precluded such persons from working. The Reagan Administration recognized a distinction between granting permanent resident status, which the Attorney General could not do without statutory authorization, and merely deferring removal actions against certain unlawfully present aliens, which the law empowered the Attorney General to do. *Id.* As Commissioner Nelson explained:

> INS is exercising the Attorney General's discretion by allowing minor children to remain in the United States even though they do not qualify on their own, but whose parents (or single parent in the case of divorce or death of spouse) have qualified under the provisions of IRCA. The same discretion is to be exercised as well in other cases which have specific humanitarian considerations.

Id.

President George H.W. Bush's Administration expanded the Family Fairness Program in 1990 by instructing that "[v]oluntary departure will be granted to the spouse and to unmarried children under 18 years of age, living with the legalized alien, who can establish" that they meet certain criteria, including residence in the United States for a specified period of time and the lack of a felony conviction. Memorandum from Gene McNary, Comm'r, INS, to Reg'l Comm'rs, *Family Fairness* (Feb. 2, 1990), *reprinted as* 67 No. 6 INTERPRETER RELEASES 153, 165 App. I ("McNary

Memo"); *see also* 60 Fed. Reg. 66,062, 66,063 (Dec. 21, 1995) ("The Service created the Family Fairness policy as a means of precluding the separation of family members by deferring their deportation."). The Service also made clear that aliens who qualified under the Family Fairness Program would be eligible to work. *See* McNary Memo.

Contemporaneous government estimates indicated that as many as 1.5 million aliens were expected to be eligible under the expanded Family Fairness program. *See Immigration Act of 1989: Hearing before the Subcomm. On Immigration, Refugees, and International Law of the H. Comm. On the Judiciary*, 101st Cong. 49 (1990) (Mr. McCollum: "Do you have any idea, any estimates of how many people we are talking about who are the immediate relatives legalized under the IRCA Act? . . . ." Mr. McNary: "Well, we are talking about 1.5 million under IRCA."); *see also id.* at 56 (Mr. Morrison: "Mr. McNary, you used the number 1.5 million IRCA relatives who are undocumented but who are covered by your family fairness policy. Do I have that number right?" Mr. McNary: "Yes."). Publicly available estimates indicate that this figure was approximately forty percent of undocumented aliens in the United States at the time. *See* Jeffrey Passel et al., *As Growth Stalls, Unauthorized Immigrant Population Becomes More Settled*, Pew Research Center (2014) *available at* http://www.pewhispanic.org/files/2014/09/2014-09-03_Unauthorized-Final.pdf (estimating that 3.5

million unauthorized immigrants lived in the United States in 1990).[2]

Shortly after implementing the expansion of Family Fairness, President Bush issued a signing statement accompanying his approval of the Immigration Act of 1990. That Act granted the Attorney General power to grant "temporary protected status" to allow otherwise deportable aliens to remain in the United States "because of their particular nationality or region of foreign state of nationality." Pub. L. No. 101-649 § 302, 104 Stat. 4978, 5030. President Bush objected to language purporting to make this the "exclusive" avenue for providing such relief, stating: "I do not interpret this provision as detracting from any authority of the executive branch to exercise prosecutorial discretion in suitable immigration cases." *See* President George H.W. Bush, *Statement on Signing the Immigration Act of 1990*, 26 WEEKLY COMP. PRES. DOC. 1947 (Nov. 29, 1990).

Recent Administrations have continued to employ deferred action. For instance, President Clinton's Administration authorized deferred action

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[2] Although fewer people ultimately applied for Family Fairness than the Administration was predicting—in part because the subsequently-enacted Immigration Act of 1990 offered preferable remedies—the point is that the administration "saw no legal barrier to going forward . . . [n]or was there an outcry from either Congress or the general public." Written Testimony of Stephen Legomsky before the H. Comm. on the Judiciary 24-25 (Feb. 25, 2015), http://judiciary.house.gov/_cache/files/fc3022e2-6e8d-403f-a19c-25bb77ddfb09/legomsky-testimony.pdf ("Legomsky Testimony").

for aliens who might prove eligible for permanent relief through the Violence Against Women Act. *See* Memorandum from Paul Virtue, INS to Reg'l Dirs., *Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues* at 3 (May 6, 1997) ("Virtue Memo") (noting that "[b]y their nature, VAWA cases generally possess factors that warrant consideration for deferred action"). President George W. Bush likewise provided deferred action for foreign students affected by Hurricane Katrina who were unable to fulfill their F-1 visa's full-time student requirement, and simultaneously suspended employer verification requirements for those students, as well. USCIS, *Interim Relief for Certain Foreign Academic Students Adversely Affected by Hurricane Katrina, Frequently Asked Questions* (Nov. 25, 2005), *available at* http://www.uscis.gov/sites/default/ files/ files/pressrelease/F1Student_11_25_05_FAQ.pdf.

These examples are by no means exhaustive. Amici have identified nearly forty examples of such policies, each of which is listed in the Appendix to this brief. The consistency and frequency with which the Executive has employed deferred action policies underscore the central role the practice has played in promoting sensible enforcement of the federal immigration laws.

B. Deferred Action Programs Promote Sensible Immigration Policy Objectives

Over the past several decades, Administrations of both political parties have repeatedly defended deferred action policies by invoking straightforward and consistent legal and policy arguments. As officials charged with enforcing U.S. immigration

laws have explained, deferred action policies are necessary to make the most efficient use of limited enforcement resources, to achieve consistent enforcement of federal immigration law, and to promote humanitarian and family values.

1. Deferred Action Is Necessary To Make The Most Efficient Use Of Limited Enforcement Resources

Like the numerous exercises of prosecutorial discretion in the immigration context that preceded it, DAPA responds to the reality that Congress has not allocated to DHS and DOJ sufficient resources to remove every person who is not authorized to be in the United States. *Compare* Memorandum from Jeh Johnson, Sec'y of Homeland Security, to Leon Rodriguez, Dir., USCIS, *Exercising Prosecutorial Discretion*, at 2 (Nov. 20, 2014), *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf ("DAPA Memo") ("Due to limited resources, DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the United States.") *with* Memorandum from Sam Bernsen, General Counsel, INS, to Comm'r, *Legal Opinion Regarding Service Exercise of Prosecutorial Discretion*, at 1 (Jul. 15, 1976) ("Bernsen Memo") ("There simply are not enough resources to enforce all of the rules and regulations presently on the books. As a practical matter, therefore, law enforcement officials have to make policy choices as to the most effective and desirable way in which to deploy their limited resources."), *and* Memorandum from Bo Cooper, General Counsel, INS, to Comm'r, *INS Exercise of Prosecutorial Discretion*, at 2 (Jul. 11, 2000) ("Cooper Memo") ("[L]imitations in

available enforcement resources . . . make it impossible for a law enforcement agency to prosecute all offenses that come to its attention.").

Resource constraints require senior immigration officials to decide how funding and personnel can be allocated and deployed in the manner most likely to advance the multiple objectives of our federal immigration laws. As described *supra*, the Executive Branch for decades has been required to prioritize enforcement objectives, in a manner similar to DAPA, and it has consistently and successfully defended the legality of such actions. In 1984, the Reagan Administration's attorneys, arguing before this Court, set forth a compelling defense, equally applicable here, of the Executive's exercise of prosecutorial discretion:

> In deciding whether to undertake enforcement action, an agency must do far more than merely determine whether there is a sound factual and legal basis for proceeding. The agency must decide which enforcement strategy will best carry out its statutory mandate and must decide how to allocate its scarce resources. It must compare the importance and cost of various potential cases, as well as the likelihood of success in each of those endeavors. . . . After considering these and other factors, an agency may rationally decide to pursue highly visible cases. Or it may decide to undertake action in a much larger number of cases. Evaluating the relevant factors and developing a

> sound enforcement strategy are quintessentially the functions of a regulatory agency. They are not appropriate for judicial review.

Brief for United States as Petitioner, *Heckler v. Chaney*, No. 83-1878, 1984 WL 565477, at *17-18 (U.S. Aug. 16, 1984).

Like its predecessor deferred action policies, DAPA reflects the Executive's determination that enforcement of the immigration laws will be most effective if the government's limited resources are used to prosecute and remove individuals who pose the greatest threats to public safety and national security instead of those who do not pose such threats, who belong to families residing peacefully and productively in the United States for many years, and who have already developed strong ties to this country and to their communities.

DAPA employs the same type of enforcement strategy that Congress has authorized the Executive to make for decades. As early as 1909, a DOJ circular advised officers not to proceed in immigration cases unless "some substantial results are to be achieved thereby in the way of betterment of the citizenship of the country." *See* U.S. Dep't of Justice, Circular Letter No. 107 (Sep. 20, 1909) (quoted in Bernsen Memo at 4). DAPA reflects a similar judgment that deferred action is necessary in order to best advance the ends of the immigration laws, national security, and public safety, in light of the limited resources available. *Compare* Memorandum from Janet Napolitano, Sec'y of Homeland Security, to David V. Aguilar, *Exercising Prosecutorial Discretion*, at 1 (Jun. 15,

2012) ("[A]dditional measures are necessary to ensure that our enforcement resources are not expended on these low priority cases but are instead appropriately focused on people who meet our enforcement priorities.") *with* Memorandum from Doris Meissner, Comm'r, INS, to Reg'l Dirs., *Exercising Prosecutorial Discretion*, at 4 (Nov. 17, 2000), *reprinted as* 77 No. 46 INTERPRETER RELEASES 1661, App. I ("Meissner Memo") ("Like all law enforcement agencies, the INS has finite resources, and it is not possible to investigate and prosecute all immigration violations. The INS historically has responded to this limitation by setting priorities in order to achieve a variety of goals. These goals include protecting public safety, promoting the integrity of the legal immigration system, and deterring violations of the immigration law. . . . An agency's focus on maximizing its impact under appropriate principles, rather than devoting resources to cases that will do less to advance these overall interests, is a crucial element in effective law enforcement management.").

The need for prosecutorial discretion has grown more acute as increasingly sophisticated threats to the homeland have emerged and the number of potential targets for enforcement actions has surged. In the years after the September 11, 2001, terrorist attacks, the Principal Legal Advisor of ICE under President George W. Bush urged that "we must prioritize our cases to allow us to place greatest emphasis on our national security and criminal alien dockets." Memorandum from William Howard, Principal Legal Advisor, ICE, to All OPLA Chief Counsel, *Prosecutorial Discretion*,

at 8 (Oct. 24, 2005) ("Howard Memo"). He elaborated:

> It is clearly DHS policy that national security violators, human rights abusers, spies, traffickers in both narcotics and people, sexual predators and other criminals are removal priorities. It is wise to remember that cases that do not fall within these categories sometimes require that we balance the cost of an action versus the value of the result. Our reasoned determination in making prosecutorial discretion decisions can be a significant benefit to the efficiency and fairness of the removal process.

Id.

DHS, of course, could have refrained from removing these individuals without granting deferred action. But deferred action policies advance homeland security and public safety objectives because they draw individuals from out of the shadows and into the open. These individuals provide their names, addresses, and histories, and the government performs background checks to assure public safety. Communities are safer when undocumented immigrants who are either victims of crimes or witnesses to crimes feel secure enough to report the crimes to the police rather than avoid contact for fear of being deported. *See* Legomsky Testimony at 29. DAPA, which reflects this Administration's decision "to prioritize threats to national security, public safety, and border

security," is consistent with this approach. *See* DAPA Memo at 3.

2. Deferred Action Policies Are Necessary To Achieve Consistent Enforcement of Federal Immigration Law

The U.S. immigration system depends on the dedicated efforts of tens of thousands of federal employees—from border patrol agents and career prosecutors to the Attorney General and the Secretary of Homeland Security. These employees are frequently called upon to make important decisions that shape the implementation and enforcement of the law, the security of the nation, the safety of the public, and the future of families. *See* Cooper Memo at 3 ("[INS] exercises prosecutorial discretion thousands of times every day.").

Policy statements setting forth the Administration's enforcement priorities are necessary to coordinate these efforts in service of a common objective, namely, "to establish a reasonable, fair, orderly, and secure system of immigration into this country and not to discriminate in any way against particular nations or people." President Ronald Reagan, *Statement on Signing the Immigration Reform and Control Act of 1986*, 22 WEEKLY COMP. PRES. DOCS. 1533 (Nov. 6, 1986). Amici's experience is that policy statements like DAPA are necessary to avoid an immigration system in which similarly situated aliens are treated differently based solely on happenstance. They also provide public transparency on important policy decisions.

Policy statements that guide enforcement discretion have played an important role in promoting consistency in the treatment of individuals in the immigration system. When the Family Fairness Program was created, the INS Commissioner explained that a policy statement was necessary "to assure uniformity in the granting of voluntary departure and work authorization for the ineligible spouses and children of legalized aliens." McNary Memo at 164. Senior officials in subsequent Administrations have similarly noted the importance of deferred action policy statements as an effective tool to promote uniformity and consistency in the enforcement of the law. *See, e.g.*, Meissner Memo at 2 ("A statement of principles concerning discretion . . . contribute[s] to more effective management of the Government's limited prosecutorial resources by promoting greater consistency among the prosecutorial activities of different offices[.]"); Howard Memo at 3 ("[I]t is important that we all apply sound principles of prosecutorial discretion uniformly throughout our offices and in all of our cases, to ensure that the cases we litigate on behalf of the United States, whether at the administrative level or in the federal courts, are truly worth litigating."); Cooper Memo at 8 ("[A]ppropriate policy guidance, reinforced by training, is necessary in order for a law enforcement agency to carry out an enforcement function properly. Such guidance serves a variety of policy goals, including promoting public confidence in the fairness and consistency of the agency's enforcement action[.]").

3. Deferred Action Policies Promote Humanitarian Values

Sound enforcement of the immigration laws requires attention to the humanitarian policy objective of promoting family unity. As INS Commissioner McNary explained: "It is vital that we enforce the law against illegal entry. However, we can enforce the law humanely. To split families encourages further violations of the law as they reunite." McNary Memo.

Immigration officials at all levels have been called upon for decades to exercise prosecutorial discretion in a manner that is faithful to the rule of law without sacrificing the preservation of, and respect for, family units to the greatest extent practicable. *See, e.g.*, Memorandum from Julie Myers, Assistant Sec'y of Homeland Security, to Field Office Dirs., *Prosecutorial and Custody Discretion* (Nov. 7, 2007) ("Myers Memo") (discussing treatment of nursing mothers and stating that "[f]ield agents and officers are not only authorized by law to exercise discretion within the authority of the agency, but are expected to do so in a judicious manner at all stages of the enforcement process"); *see also* Nelson Statement at 1200. The Family Fairness Program, discussed *supra*, is one salient example of how federal immigration officials have attempted to avoid unnecessary harm to family unity.

DAPA's aim of preserving family unity in cases that do not threaten public safety is consistent with the policy objectives that have guided federal immigration enforcement efforts for decades. *E.g.*, DAPA Memo at 3 (explaining that aliens who

"commit serious crimes or otherwise become enforcement priorities" are ineligible). Amici's experience demonstrates that the best approach to achieving rational and effective enforcement of our immigration laws is to prioritize threats to public safety and national security, while simultaneously demonstrating compassion for families whose members pose no substantial risks and who have developed ties to the communities in which they live.

II. ALLOWING ALIENS WITH DEFERRED ACTION TO APPLY FOR WORK AUTHORIZATION IS AN IMPORTANT COMPONENT OF IMMIGRATION ENFORCEMENT THAT IS CONSISTENT WITH FEDERAL IMMIGRATION LAW

Federal law provides that an "alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority," may apply for work authorization by showing "economic necessity for employment." 8 C.F.R. § 274a.12(c)(14). This thirty-five-year-old regulation codifies a policy that has been in place for even longer, and it reflects extensive legislative, administrative, and public deliberations that warrant judicial deference. The policy was reexamined and reaffirmed following extensive public comment and congressional action in 1986 to outlaw the employment of "unauthorized" aliens; and Congress has subsequently ratified the practice.

A. The Executive's Longstanding Policy of Allowing Aliens with Deferred Action To Apply for Work Authorization Is the Product of Extensive Administrative, Legislative, and Public Deliberations

The decision to allow aliens with deferred action policies to apply for work authorization was neither accidental nor anomalous. To the contrary, the availability of work authorization for such aliens was a deliberate choice that was first made in the 1970s, repeatedly affirmed over the following decades by administrations of both parties, and ratified by Congresses that were well aware of the policy.

1. INS Has Allowed Aliens With Deferred Action to Apply for Work Authorization Since at Least the 1970s

In 1975, INS's General Counsel explained that the Service authorized certain aliens to work in cases "when we do not intend or are unable to enforce the alien's departure," even though such work authorization "doesn't make his illegal stay here any less illegal." Sam Bernsen, *Leave to Labor*, 52 No. 35 INTERPRETER RELEASES 291, 294-95 (Sep. 2, 1975). Such authorizations were not given "automatically," but rather, "[t]he alien has to come to the Service and make a request." *Id.* at 295.[3]

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[3] The same is true today for aliens with deferred action. *See* 8 C.F.R. §274a.12(c)(14) (requiring that aliens with deferred action establish "economic necessity" in order to receive employment authorization); *see also* 56 Fed. Reg. 41,767, 41,781 (Aug. 23, 1991) (rejecting a proposal to eliminate the

By the late 1970s, INS work authorizations were common, and served a host of important functions for both aliens and employers. Although in the 1970s there was not yet any blanket legal prohibition on the employment of undocumented aliens, permitting certain classes of undocumented aliens to obtain work authorization, including those with deferred action, served several objectives.

First, in 1972 Congress made work authorization a prerequisite for certain aliens to obtain a Social Security number. *See* Social Security Amendments of 1972, Pub. L. No. 92-603 § 137, 86 Stat. 1329, 1364 (codified as amended at 42 U.S.C. § 405(c)(2)(B)(i)(I)); 44 Fed. Reg. 10,369, 10,371 (Feb. 20, 1979) (adding 20 C.F.R. § 422.107(e)); *see also* Bernsen, *Leave to Labor*, at 294. Employers then, as now, were much less likely to hire aliens "off the books," and to avoid full remittance of Social Security payments and other taxes attributable to such aliens, if the aliens had Social Security numbers that allowed them to work "above board."[4]

Second, agricultural workers had a special reason to seek work authorization: as of 1974, federally registered farm labor contractors were

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economic necessity requirement for aliens with deferred action).

[4] INS had even launched a "voluntary" pressure campaign to discourage employers from hiring aliens who lacked such authorization. *See* Sam Bernsen, *Updating the Immigration Law*, 9 IN DEFENSE OF THE ALIEN 203, 204-06 (1986); *Illegal Aliens: Hearings Before Subcomm. No. 1 of the H. Comm on the Judiciary*, 92nd Cong. 1020 (1971 & 1972).

prohibited from facilitating the hiring of any alien "not lawfully admitted for permanent residence, or who has not been authorized by the Attorney General to accept employment."[5] Farm Labor Contractor Registration Amendments Act, Pub. L. No. 93-518 § 11, 88 Stat. 1652, 1655 (1974).[6]

Finally, as of 1976, aliens who "continue[d] in or accept[ed] unauthorized employment" were barred from obtaining an adjustment of status. Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571 § 6, 90 Stat. 2703, 2706 (codified as amended at 8 U.S.C. § 1255(c)); *see also* 44 Fed. Reg. 43,480 (Jul. 25, 1979) (describing this provision[7] as legislative recognition of the Attorney General's preexisting authority to grant work authorization).

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[5] Prior to 1974, the statute prohibited these farm labor contractors from facilitating the hiring of any alien who was "violating the provisions of the immigration and nationality laws of the United States." Farm Labor Contractor Registration Act, Pub. L. No. 88-582 § 5(b), 78 Stat. 920, 922 (1964).

[6] IRCA subsequently repealed this language, which became mostly redundant in light of IRCA's broader employer sanctions provisions. IRCA, § 101(b)(1)(C), 100 Stat. at 3372; *see also* Migrant and Seasonal Agricultural Worker Protection Act, Pub. L. No. 97-470, §§ 106 & 523, 96 Stat. 2583, 2589-90, 2600 (1983).

[7] INS actually cited to Public Law 95-571, but the context makes it clear that the reference is to 94-571. *See* 44 Fed. Reg. at 43,480.

2. In the Early 1980s, INS Codified its Work Authorization Policy for Categories of Aliens Not Authorized To Be in the United States, Including Those with Deferred Action

In 1979, INS "for the first time codif[ied] existing employment authorization procedures," publishing a proposed rule in the Federal Register. 44 Fed. Reg. at 43,480. The proposal provided that "[a]n alien who, as an exercise of the Service's prosecutorial discretion, has been allowed to remain in the United States for an indefinite or extended period of time will . . . be eligible to apply" for work authorization. *Id.*; *see also id.* (proposing 8 C.F.R. § 109.1(b)) ("An alien who is not maintaining a lawful nonimmigrant status may apply for employment authorization if he . . . has been granted permission to remain in the United States for an indefinite or extended period of time by the Immigration and Naturalization Service.").

The next year, after giving "[c]areful consideration" to public comments, INS published a "significantly modified" proposal. 45 Fed. Reg. 19,563 (Mar. 26, 1980). This revised version made no mention of the Service's "prosecutorial discretion," or of INS's longstanding practice of making work authorization available to aliens whose removal had been deferred. The Federal Register contains no explanation for this omission.

Comments on the revised proposal expressed "concern" that it "did not adequately cover all categories [of] nonimmigrants who are permitted to work while in the United States." 46 Fed. Reg. 25,079, 25,080 (May 5, 1981); *see also* Deborah

Levy, *The Alien Rights Law Project*, 27 HOWARD L.J. 1265, 1277 (1984). The final rule, published a few months after President Reagan took office, restored work authorization eligibility for the category of aliens that had been omitted in the 1980 revised proposal, namely, "[a]ny alien in whose case the district director recommends consideration of deferred action, an act of administrative convenience to the government which gives some cases lower priority." 46 Fed. Reg. at 25,081.[8]

3. Congress Affirmed INS's Work Authorization Rule When it Enacted the Immigration Reform and Control Act of 1986

In 1986, the Federation for American Immigration Reform ("FAIR") filed a petition for rulemaking, seeking to rescind the 1981 rule that allowed aliens subject to deferred action to apply for work authorization. 51 Fed. Reg. 39,385 (Oct. 28, 1986). FAIR asserted that INS had "acted beyond its statutory authority and contrary to the purpose of the Immigration and Nationality Act" by allowing "illegal or temporarily present aliens to apply for and receive work authorization." *Id.* at 39,386; *see also id.* at 39,387 ("The granting of work authorization to deportable aliens and nonimmigrants not authorized by statute to work allows such aliens to compete directly with

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[8] The current regulations contain language that is virtually identical to that added in 1981. *See* 8 C.F.R. § 274a.12(c)(14) ("An alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority.").

American workers for jobs. This is in direct conflict with the purpose for which the [Immigration and Nationality Act] was enacted."). INS published FAIR's petition in the Federal Register and solicited public comments. *Id.*

Before the Service acted on FAIR's petition, Congress intervened and ratified INS's interpretation of its legal authorities. The 1986 Immigration Reform and Control Act ("IRCA") prohibited employers from employing aliens not "lawfully admitted for permanent residence" or "authorized to be . . . employed by [the Immigration and Nationality Act] *or by the Attorney General.*" IRCA, § 101(a)(1), 100 Stat. at 3368 (codified at 8 U.S.C. § 1324a(h)(3)) (emphasis added). This language reaffirmed the Attorney General's authority to grant work authorizations as well as the manner in which INS had been exercising that authority—a practice that Congress declined to limit in any way. *See* 52 Fed. Reg. 46,092, 46,093 (Dec. 4, 1987) ("[T]he only logical way to interpret this phrase is that Congress, being fully aware of the Attorney General's authority to promulgate regulations, and approving of the manner in which he has exercised that authority in this matter, defined 'unauthorized alien' in such fashion as to exclude aliens who have been authorized employment by the Attorney General through the regulatory process, in addition to those who are authorized employment by statute").

Congress had notice of the 1981 regulations when it passed IRCA. In addition to the publicly-noticed FAIR petition mentioned above, the Service's claim of work authorization authority was highlighted directly to Congress and included in the

Act's legislative history. *See* Letter from Robert McConnell, DOJ, to Romano Mazzoli (Apr. 4, 1983), *included in Immigration Reform and Control Act of 1983, Hearings before the Subcomm. On Immigration, Refugees and Int'l Law of the H. Comm. on the Judiciary*, 98th Cong. 1450 (1983) ("INS currently has authority to define classes of aliens who may be employed in the U.S."); Letter from Alan Nelson, Comm'r, INS, to Romano Mazzoli (May 14, 1984), *included in INS Oversight and Budget Authorization for Fiscal Year 1985: Hearings Before the Subcomm. On Immigration, Refugees, and Int'l Law of the H. Comm. on the Judiciary*, 98th Cong. 357 (1984) (explaining that INS regulations "set forth eligibility and criteria for employment authorization"). Moreover, INS's work authorization regulations had also already been the subject of litigation when Congress deliberated upon and enacted IRCA. *E.g.*, *Diaz v. INS*, 648 F. Supp. 638 (E.D. Cal. 1986); *Canas-Garcia v. McKinnon*, 1984 U.S. Dist. LEXIS 14946, 83-cv-2077 (D. Mass. Jul. 13, 1984); *Gilana v. Smith*, 1981 U.S. Dist. LEXIS 16824, 81-cv-3829 (N.D. Ill. Dec. 24, 1981).

IRCA marked the culmination of years of legislative deliberations about the Attorney General's power to issue work authorizations for aliens. In 1971, the Nixon Administration introduced legislation prohibiting the employment of "aliens who are illegally in the United States or are in an immigration status in which such employment is not authorized." H.R. 2328 § 26 (1971). But at a hearing before "Subcommittee Number 1" of the House Judiciary Committee, an organization representing "American Business"

warned that "[t]he phrasiology 'in violation of law or in an immigration status in which such employment is not authorized' is not sufficiently flexible to allow the Immigration and Naturalization Service to continue present treatment of aliens who work in certain categories." *Illegal Aliens: Hearings Before Subcomm. No. 1 of the H. Comm on the Judiciary*, 92nd Cong. 1243-45 (1971 & 1972) (statement of the American Council of Int'l Personnel, Inc.). When the INS General Counsel was later asked by the same Subcommittee about INS's "administrative permissiveness in allowing certain aliens to undertake employment," he insisted that the language in the Administration's proposed bill was intended to cover all cases where INS had authorized employment. *Id.* at 1344.

The Subcommittee decided to remove any possible ambiguity left by the Administration's "phrasiology." It reported a new version of the bill that prohibited employment of "any alien in the United States who has not been lawfully admitted to the United States for permanent residence, *unless the employment of such alien is authorized by the Attorney General.*" H.R. 16188 (1972) (emphasis added) (as reported in H.R. Rep. 92-1366, at 12 (1972)); *see also* H.R. Rep. 92-1366, at 1 (1972) ("The purpose of this bill is to make it unlawful to knowingly hire aliens who have not been lawfully admitted for permanent residence or are not authorized by the Attorney General to work while in the United States."). Subsequently proposed employer sanctions bills, up to and including the law that was ultimately enacted as IRCA in 1986, all recognized the Attorney General's

power to grant work authorizations. *See* IRCA, § 101(a)(1) (codified at 8 U.S.C. § 1324a(h)(3)); *see also* H.R. 982 § 2 (1973) (reported in H.R. Rep. 93-108, at 2 (1973)); H.R. 8713 § 2 (1975) (reported in H.R. Rep. 94-506, at 26 (1975)); S. 2252 § 5 (1978) (quoted in *Alien Adjustment and Employment Act of 1977: Hearings Before the S. Comm. on the Judiciary*, 95th Cong. 3 (1978)).[9]

Armed with full knowledge of INS's assertion of work authorization authority, as well as ample opportunities to rescind or invalidate the same, Congress ratified the Service's policy. Indeed, in a separate provision in IRCA, Congress demonstrated a clear understanding that the Attorney General had authorized work for aliens whose removal had been deferred—and that such authorization would make an alien eligible for lawful employment under IRCA.

Congress had earlier considered an amendment to a draft of IRCA that would have made it unlawful for an employer to discriminate against *any* alien who had been authorized to work. *See* 130

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[9] One further change in the proposed language before IRCA is worth mentioning. In 1976, testimony noted that the new wording used in the 1972 bill ignored the fact that the INA was itself a source of work authorization. *S. 3074: Hearings Before the Subcomm. On Immigration and Naturalization of the S. Comm. on the Judiciary*, 94th Cong. 103 (1976) (statement of Stanley Mailman, Ass'n of Immigration and Nationality Lawyers). Thus, in 1982, the House Committee reported a bill penalizing the employment of aliens not authorized either "by this Act or by the Attorney General." H.R. 6514 (1982) (reported in H.R. Rep. 97-890, at 41 (1982)). That is the substance of the provision Congress eventually included in IRCA.

CONG. REC. 15,935 (Jun. 12, 1984). Congress, however, ultimately enacted a narrower version of the amendment, which provided protection against discrimination to only lawful permanent residents, temporary residents, refugees, and asylees. *See* IRCA § 102 (codified as amended at 8 U.S.C. § 1324b(a)). A comparison between IRCA's non-discrimination provision, which covers a subset of aliens who are authorized to work, and the employer sanctions provision, which extends more broadly, highlights the relevant distinction:

Employer Sanctions, § 101(a)(1)	**Nondiscrimination, § 102**
"lawfully admitted for permanent residence, ***or . .. authorized to be . . . employed by [the INA] or by the Attorney General.***"	"lawfully admitted for permanent residence, ***is granted the status of an alien lawfully admitted for temporary residence under section 245A(a)(1), is admitted as a refugee under section 207, or is granted asylum under section 208***"

Advocacy groups had complained that the narrowed version of the non-discrimination provision excluded from coverage "certain non-immigrant aliens, paroled aliens, aliens with extended voluntary departure status, and other classes of persons authorized to work but not

included in the specific categories delineated by the anti-discrimination provision." *See Immigration Control and Legalization Amendments: Hearing Before the Subcomm. On Immigration, Refugees and Int'l Law of the H. Comm. on the Judiciary*, 99th Cong. 127 (1985) (statement of Richard Fajardo, MALDEF). But Congress retained the narrower version and deliberately excluded from the anti-discrimination protection that subset of aliens who, although not lawful permanent or temporary residents, refugees, or asylees, were nonetheless authorized to work by the Attorney General, including those aliens with deferred action. *Cf.* Letter from Seema Nanda, DOJ, to David Burton (Sep. 10, 2012) *available at* http://www.justice.gov/sites/default/files/crt/legacy/2012/09/27/161.PDF (explaining that aliens who qualify for the DACA program are not protected from citizenship status discrimination under IRCA).

4. INS Reaffirmed its Work Authorization Rule Immediately Following IRCA's Passage, After Extensive Notice and Comment

Shortly after Congress enacted IRCA, INS began to solicit input on regulations to implement the law. *See Implementation of the Immigration Reform and Control Act of 1986, Hearing Before the Subcomm. on Immigration, Refugees, and Int'l Law of the H. Comm. On the Judiciary*, 99th Cong. 36-37, 60-61 (1986). The Service took an "unprecedented step to permit and encourage as much public input as possible," circulating an "internal draft [of] preliminary regulations prior to their formal publication in the federal register." 52

Fed. Reg. 2115 (Jan. 20, 1987). The draft regulations maintained work authorization eligibility for aliens with deferred action and also added a new group: "An alien who is a member of a nationality group granted extended voluntary departure." *See* INS, Preliminary Working Draft of Regulations (Jan. 20, 1987), *reprinted at* 32 IMMIGRATION AND NATIONALITY ACTS LEGISLATIVE AND RELATED DOCUMENTS, No. 127 (Supp. 1997).

While the Service's draft regulations were being circulated, INS officials made "[m]any public appearances . . . to inform and solicit comments from interested parties." 52 Fed. Reg. 8762 (Mar. 19, 1987). After reviewing and evaluating "numerous comments" from a "wide cross-section of society," INS published its proposed rules, which retained eligibility for work authorization in the deferred action and extended voluntary departure contexts. *Id.* Subsequently, after again considering comments on its proposed rules from "a very broad spectrum of American society [that] included private citizens; agricultural, business, industrial and labor organizations; Congressional sources and governmental entities at the federal, state, and local levels; educational institutions; voluntary agencies; interest groups and organizations; and law firms," INS promulgated final rules, which once again provided for work authorization for aliens with deferred action and extended voluntary departure. 52 Fed. Reg. at 16,216, 16,220, 16,227.[10]

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[10] USCIS later substituted "deferred enforced departure" for "extended voluntary departure." *See* 75 Fed. Reg. 58,962, 58,990 (Sep. 24, 2010) (amending 8 C.F.R. § 274a.12(a)(11)); *see also* 75 Fed. Reg. 33,446, 33,457 (Jun. 11, 2010)

As INS was promulgating its final rules on IRCA, FAIR's petition to rescind the 1981 regulations remained pending. Shortly after Congress enacted IRCA, INS extended the comment period on the FAIR petition, noting that IRCA's recognition of the Attorney General's power to grant work authorization "appears to have a direct bearing on the issues to be resolved." 51 Fed. Reg. 45,338, 45,338 (Dec. 18, 1986). FAIR itself submitted a supplemental memorandum in which it argued that IRCA's enactment supported the petition to rescind the rule. *See* FAIR, *Supplemental Statement Regarding the Permissible Scope of the Attorney General's Authority to Grant Work Authorization* (Jan. 29, 1987), FAIR Records, 1867-2006, George Washington Univ. Gelman Library, Collection No. MS2195, Box 95, Folder 2.

INS thereafter denied FAIR's petition, having considered comments from a "wide spectrum of interested parties, ranging from local to national to international governmental entities, and from private individuals to business and educational institutions to public interest groups." 52 Fed. Reg. 46,092 (Dec. 4, 1987). INS pointed both to the Attorney General's general authority to enforce the immigration laws and establish regulations, as well as IRCA's more specific recognition of the Attorney General's power to grant work authorizations. *Id.* at 46,093 (discussing Immigration and Nationality Act, Pub. L. No. 82-414, § 103(a), 66 Stat. 163, 173-

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(explaining that the reference to extended voluntary departure had become "obsolete" and proposing new regulation covering deferred enforced departure).

74 (1952); IRCA § 101(a)(1) (codified at 8 U.S.C. § 1324a(h)(3)). With respect to the latter, INS explained:

> [T]he only logical way to interpret this phrase is that Congress, being fully aware of the Attorney General's authority to promulgate regulations, and approving of the manner in which he has exercised that authority in this matter, defined "unauthorized alien" in such fashion as to exclude aliens who have been authorized employment by the Attorney General through the regulatory process, in addition to those who are authorized employment by statute.

52 Fed. Reg. at 46,093.[11]

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[11] The INS also noted that "most of the classes" permitted to apply for work authorization "are very small to begin with," and that "the total number of aliens authorized to accept employment is quite small and the impact on the labor market is minimal." 52 Fed. Reg. at 46,093. INS did not in any way suggest, however, that the number of eligible aliens was relevant to the question of its legal authority, nor did INS indicate that there would be grounds for rescinding the longstanding practice if and when the number of aliens eligible for deferred action were to increase, as it had in the past.

5. Since 1987, INS Has Consistently Permitted Aliens With Deferred Action to Apply For Work Authorization, And Congress Has Left This Policy Undisturbed

In the years following IRCA's passage, INS continued to grant work authorization to aliens not authorized to be in the United States, including aliens covered by many of the policies discussed above. *E.g.*, McNary Memo ("Work authorization will be granted to aliens who qualify for voluntary departure" under the expanded Family Fairness program); 61 Fed. Reg. 13,061 (Mar. 26, 1996) (inviting VAWA self-petitioners to apply for work authorization after obtaining direct action status, notwithstanding the fact that the original VAWA statute did "not direct the Service to provide employment authorization based solely on the filing or approval of a self-petition"); USCIS, Press Release, *USCIS Announces Interim Relief for Foreign Students Adversely Impacted by Hurricane Katrina* (Nov. 25, 2005) ("Katrina-impacted foreign academic students not covered by the Notice and their dependents (F-2 visa holders) may request deferred action and apply for employment authorization based on economic necessity."). In addition to aliens with deferred action, current regulations allow for work authorization for aliens with deferred enforced departure, applicants for adjustment of status, and even certain aliens already subject to removal proceedings. 8 C.F.R. §§ 274a.12(a)(11), (c)(9), (c)(10).

FAIR complained to Congress about this practice. *See Immigration Reform and Control Act of 1986 Oversight: Hearings Before the Subcomm.*

On Immigration, Refugees, And International Law of the H. Comm. on the Judiciary, 101st Cong. 597 (1989) (statement of Daniel Stein, FAIR) (criticizing the regulations providing for work authorization for aliens "given deferred action, applicants for political asylum, aliens granted extended voluntary departure, parolees, applicants for adjustment of status, asylees, and a whole host of classifications attributed to administrative and processing delay"). Yet Congress declined to rescind or even question the agency's authority.

To be sure, Congress has periodically limited the classes of aliens eligible for work authorization, but it has *never* altered the longstanding policy that aliens subject to deferred action may apply for work authorization, despite the legislature's knowledge of that longstanding and transparent policy. *E.g.*, Pub. L. No. 103-322 § 130005(b), 108 Stat. 1796, 2028 (1994) (codified as amended at 8 U.S.C. § 1158(d)(2)) (asylum applicants); Pub. L. No. 104-208, § 303(a), 110 Stat. 3009, 3009-585 (1996) (codified as amended at 8 U.S.C. § 1226(a)(3)) (detained aliens). Congress even enacted a provision in 1996 in which it recognized the agency's practice of authorizing some aliens *already subject to removal orders* to work. *Id.* § 305(a)(3), 110 Stat. at 3009-600 (codified as amended at 8 U.S.C. § 1231(a)(7)). Actions such as these—and Congress's failure to limit the agency's well-known asserted authorities and practices—belie Respondents' argument (Br. in Opp. at 32-33) that Congress has limited the Secretary's power to confer work authorization so as to encompass only

those classes of aliens that the INA itself specifies as eligible for such authorization.[12]

B. Authorizing Certain Aliens With Deferred Action To Work Is Consistent With Established Immigration Policy Objectives

The longstanding regulations governing work authorization reflect sensible policy concerns, which became even more acute in 1986 when Congress prohibited employers from hiring aliens without work authorization. Absent work authorization, aliens, particularly those of modest means, would likely have no lawful way to support themselves or their families, and might therefore become a burden on those closest to them. Permitting aliens without means to remain in this country while

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[12] Another example is also telling. In 1996, Congress for the first time established time-limits for grants of "voluntary departure"—another category of aliens not authorized to be in the United States who have long been eligible for work authorization under the regulations. *See* Pub. L. No. 104-208 § 304(a)(3), 110 Stat. 3009, 3009–596 (1996) (codified as amended at 8 U.S.C. § 1229c(a)(2)(A)). Since, under INS's regulations, aliens with voluntary departure could be granted work authorization for the period of the voluntary departure, this legislation effectively restricted the duration of work authorizations for those aliens. *See* 52 Fed. Reg. 16,216, 16,227 (May 1, 1987) (adding 8 C.F.R. § 274a.12(c)(12)). Because Congress did nothing to restrict the availability of work authorization in connection with deferred action, INS explained that deferred action might be available where voluntary departure no longer was, and that, if deferred action were granted, "employment authorization may be granted under the provisions of §274a.12(c)(14)." 62 Fed. Reg. 10,312, 10,325 (Mar. 6, 1997).

denying them permission to work would also cause economic distortions. Aliens in this position might turn to illegal work for lower wages in exploitative conditions, causing downstream effects on the labor market, including adverse effects on American workers. *See* Executive Office of the President, Council of Economic Advisers, *The Economic Effects of Administrative Action on Immigration* at 10 (2014).

Aliens with deferred action may obtain work authorization only if they can show "economic necessity" as defined by federal poverty guidelines. *See* 8 C.F.R. §§ 274a.12(c)(14), (e). This condition ensures that those aliens who remain in the country but who lack the means necessary to support themselves are able to earn a living through legitimate, above-board employment. The rule is consistent with the policy objective of ensuring that aliens who are not subject to deportation will live in the "sunlight" instead of "the shadows." *See* Reagan, *IRCA Signing Statement*; *see also* DAPA Memo at 3.

The economic necessity condition has been a part of the work authorization rule from the very beginning. INS's first proposed rules in 1979 would have granted authorization only "if the alien establishes to the satisfaction of the district director that he is financially unable to maintain himself during that period." 44 Fed. Reg. at 43,480. Though commenters expressed "opposition" to this requirement, arguing that it would "unduly burden the alien and Service," INS retained it, limiting authorization to that subset of aliens with deferred action who could establish "to the satisfaction of the district director that he/she is financially unable to

maintain himself/herself and family without employment." 46 Fed. Reg. at 25,080-081. INS chose to "alleviate" the complained-of "burden" by clarifying the standard, adopting the "Community Service Administration Income Poverty Guidelines" as "the basic criteria to establish economic necessity for employment authorization requests where the alien's need to work is a factor" (including aliens with deferred action). 46 Fed. Reg. at 25,080.[13]

Following IRCA, INS re-promulgated its rule and included both the "economic necessity" requirement and the reference to the poverty guidelines. 52 Fed. Reg. at 16,228. This language remains on the books today. 8 C.F.R. §§ 274a.12(c)(14) & (e).

Allowing aliens whose removal has been deferred to work upon a showing of economic necessity is a sensible tool employed for decades by both Republican and Democratic administrations to advance the humanitarian and economic objectives underlying the federal immigration laws. These policies were adopted carefully and thoughtfully over the course of decades, and they have been identified, studied, and ratified by Congress, including after the 1986 enactment of IRCA. At a minimum, the regulations reflect the Executive Branch's longstanding interpretation of the legal authorities granted to INS and DHS by federal

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[13] INS later updated its regulation to acknowledge legislation requiring the Secretary of HHS to update these guidelines periodically. *See* 46 Fed. Reg. 55,920, 55,921 (Nov. 13, 1981) (citing Pub. L. No. 97-35 § 673, 95 Stat. 357, 512 (1981)).

immigration laws. As such, they are worthy of this Court's deference. *See Barnhart v. Walton*, 535 U.S. 212, 220 (2002).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX[14]

Year	Type of Action	Class of Aliens	No. Affected	Comments
1956	Parole	Orphans adopted by U.S. citizens abroad	923	Legislation was pending
1956 -72	Extended Voluntary Departure (EVD)	Third preference visa petitioners	Unknown	*See U.S. ex rel. Parco v. Morris*, 426 F. Supp. 976, 979-80 (E.D. Pa. 1977)
1956 -58	Parole	Hungarians	31,915	
1959 -72	Parole	Cubans	621,403	
1962 -65	Parole	Chinese	15,100	
1975 -79	Parole	Vietnamese, Cambodians, and Laotians	Nearly 360,000	
1976	EVD	Lebanese	Unknown	
1977	Suspended Deportation	"*Silva* letterholders"	250,000	
1977	EVD	Ethiopians	At least 15,000	Extended in 1982

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[14] Sources: CRS Report, *supra*; Karl R. Thompson, Principal Deputy Assistant Att'y General, OLC, Memorandum Op., for the Sec'y of Homeland Security and the Counsel to the President, *The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others* (Nov. 19, 2014); Am. Immigration Counsel, *Executive Grants of Temporary Immigration Relief, 1956-Present* (Oct. 2014).

1977 -80	Parole	Soviet Union nationals	Over 50,000	Issued after statutory cap on conditional entries was met
1978	EVD	Ugandans	Unknown	
1978	EVD	Nurses	Unknown	43 Fed. Reg. 2776
1979	EVD	Nicaraguans	3,600	
1979	EVD	Iranians	Unknown	
1980	EVD	Afghans	Unknown	
1981 1987	EVD	Polish	7,000	Extended in 1984 and 1987
1987	AG directed INS to refrain from deportation	Nicaraguans	150,000-200,000	Legislation was pending
1987	Indefinite Voluntary Departure	*Certain* children and spouses of aliens eligible for legalization under IRCA ("Family Fairness")	Over 100,000 families	Nelson Statement; *see also* discussion above
1989 1990	Deferred Action & Deferred Enforced Departure (DED)	Chinese	80,000	
1990	Voluntary departure	*All* spouses and children of aliens eligible for legalization under IRCA ("Family Fairness")	1.5 million	McNary Memo; *see also* discussion above
1991	DED	Persian Gulf	2,227	

1992	DED	Salvadorians	190,000	Issued after expiration of legislative grant of temporary protected status.
1997	DED	Haitians	40,000	Legislation was pending
1997	Deferred action	VAWA beneficiaries	Unknown	Virtue Memo
1998	Temporary deportation suspension	Salvadorians, Guatemalans, Hondurans, and Nicaraguans	150,000	Hurricane Mitch
1999	DED	Liberians	10,000	Issued after expiration of legislative grant of temporary protected status
2001 -02	Parole, deferred action, and stays of removal	"T" and "U" visa applicants	Unknown	
2005	Deferred Action	Students affected by Hurricane Katrina	Unknown	Legislation was pending
2007	DED	Liberians	10,000	Issued after expiration of legislative grant of temporary protected status
2007	Executive discretion	Nursing mothers	Unknown	Myers Memo
2009	DED	Liberians	Unknown	

2009	Extended deferred action	Foreign born spouses and children under the age of 21 of United States citizens who had died	Unknown	Memo from Donald Neufeld, USCIS, to Field Leadership, *Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children* (Sep. 4, 2009)
2010	Parole	Haitian orphans in the process of being adopted	Unknown	Haitian earthquake
2011	Deferred action	Victims of human trafficking and sexual exploitation	Unknown	
2011	DED	Liberians	3,600	
2012	Deferred action	Foreign born individuals who entered the United States before their 16th birthday and were under the age of 31 as of June 2012	Up to 1.8 million	Legislation was pending